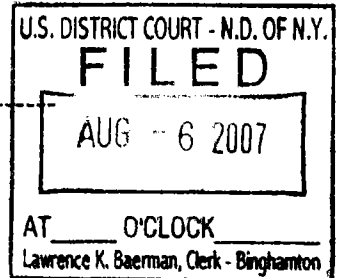


At a term of the United States District
Court for the Northern District of New
York, held in Albany, New York on
the 11th day of June, 2007.

PRESENT: Honorable Thomas J. McAvoy, Senior U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK



EVA DIAZ,

Plaintiff,

-against-

ORDER

Case No.: 7:04-cv-558

**VILLAGE OF SARANAC LAKE, O'CONNOR SKI LIFT
INC., and DANIEL O'CONNOR & SONS, INC.,**

Defendants.

Michael S. Martin, Esq. attorney for the defendant Village of Saranac Lake, having made a motion to this Court for an Order dismissing plaintiff's complaint pursuant to Fed.R.Civ.P.12 (b) (6) for failure to state a claim, or in the alternative for summary judgment dismissing plaintiff's complaint pursuant to Fed.R.Civ.P. 56, and having submitted affidavits, an attorney affirmation with exhibits annexed thereto, the Memorandum of Law, and the reply affirmation, all in support of defendant Village of Saranac Lake's motion, and the plaintiff having opposed the motion, and having submitted plaintiff's affidavit, an attorney affirmation with exhibits annexed thereto and the Memorandum of Law, all in opposition to the motion, and the Court having heard Oral arguments on the motion from the attorney for defendant Village of Saranac Lake, Michael S. Martin, Esq. and the attorney for plaintiff, Francis B. Mann, Jr. Esq.;

NOW, upon reading the notice of motion dated April 27, 2007, the attorney affirmation dated April 27, 2007 and the exhibits annexed thereto, the affidavit of Joseph DeFuria, sworn to on the 26th day of April, 2007, the affidavit of Andrew M. Foster, sworn to the 24th day of April, 2007, the affidavit of John M. Sweeney, sworn to the 27th day of April, 2007, the Memorandum of Law dated April 27, 2007, and the Reply affirmation dated May 31, 2007 with the exhibits annexed thereto, all in support of the motion, and upon reading the plaintiff's affidavit sworn to on May 2007, the attorney affirmation dated May 25, 2007 and the exhibits annexed thereto and the Memorandum of Law dated May 25, 2007, all in opposition to the motion, and upon hearing oral arguments from the attorney for plaintiff, Francis B. Mann, Jr. and the attorney for defendant Village of Saranac Lake, Michael S. Martin, and due deliberation having been had by the Court;

The Court hereby determines that questions of fact exist as to whether defendant was

negligent, whether defendant's actions were the proximate cause of plaintiff's injuries, the extent of plaintiff's contributory negligence, and whether plaintiff assumed the risk of the activity she undertook; and it is hereby


ORDERED that defendant Village of Saranac Lake's motion to dismiss pursuant to Fed.R.Civ.P. 12 (b) (6) for failure to state a claim is denied; and it is further

ORDERED that defendant Village of Saranac Lake's motion for summary judgment pursuant to Fed.R.Civ.P. 56 is denied; and it is further

ORDERED that Res Ipsa Loquitor does not apply to the facts of this case and can not be used by plaintiff in any manner on the issue of liability.

Signed this 9th day of June, 2007, at Binghamton, New York.

ENTER.


Hon. Thomas J. McAvoy
Senior U.S. District Judge